IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

S & W CONTRACTING SERVICES, INC.	:	CIVIL ACTION
	:	
vs.		
	:	
PHILADELPHIA HOUSING AUTHORITY; T.A.S.K.E.R, INC.; PHILADELPHIA REVITALIZATION AND EDUCATION PROGRAM (PREP); T.A.S.K.E.R./PREP; LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; LABORER'S DISTRICT COUNCIL OF THE METROPOLITAN AREA OF PHILADELPHIA AND VICINITY; RUDOLPH NASH, SR.; LOCAL 332, DELAWARE VALLEY INSULATION AND ABATEMENT CONTRACTORS ASSOCIATION, INC.; and BARRINGTON GROUP	:	NO. 96-6513

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 25th day of March, 1998, upon consideration of defendant Laborers' International Union of North America's ("LIUNA" or "National Union") Motions to Dismiss (Document No. 32, filed July 31, 1997) and plaintiff S & W Contracting Services, Inc.'s Answer to Defendant, Laborers' International Union of North America's, Motion to Dismiss Complaint (Document No. 31, filed July 28, 1997), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that defendant LIUNA's Motion to Dismiss is **DENIED IN PART** and **GRANTED IN PART**, as follows:

Defendant LIUNA's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(b) is **DENIED** as to all Counts.

Defendant LIUNA's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED** as to Counts III and IV; Counts III and IV of the Amended

Complaint are hereby **DISMISSED WITH PREJUDICE**.[1]

Defendant LIUNA's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED** as to Counts I, II and V.

IT IS FURTHER ORDERED that defendant LIUNA's request for oral argument pursuant to Local Rule 7.1(f) is **DENIED**.

MEMORANDUM

Background. Plaintiff, S & W Contracting Services, Inc. ("S & W"), is a contractor licensed in Philadelphia to engage in the business of asbestos removal. The essence of plaintiff's complaint is that defendants acted in concert to mislead it into believing that it would be employed as a subcontractor in the removal of asbestos under a contract awarded by the Philadelphia Housing Authority, when in fact defendants were using plaintiff's contacts and expertise to ensure that they would be awarded, and could perform, the entire contract themselves.

Plaintiff names the following parties as defendants to this suit: (1) Philadelphia Housing Authority ("PHA") – a governmental agency; (2) T.A.S.K.E.R. – a management agency owned and operated by tenants of public housing; (3) Philadelphia Revitalization and Education Program, Inc. ("PREP") – a non-profit organization "created under the leadership of Laborer's International Union of North America," Amended Complaint ¶ 6; (4) T.A.S.K.E.R./PREP – a joint venture established to bid on asbestos removal contracts being awarded by PHA with federal moneys; (5) Laborer's International Union of North America, AFL-CIO ("LIUNA" or National "Union") – a national labor organization; (6) Laborer's District Council of the Metropolitan Area of Philadelphia and Vicinity ("District Council") – a local labor organization; (7) Rudolph Nash, Sr.; (8) Local 332, Delaware Valley Insulation and Abatement Contractors Association, Inc. ("Local 332" or

[1] Because the complaint at issue has been amended once, the Court will not dismiss Count III and IV without prejudice to plaintiff's right to file a second amended complaint. In the event plaintiff believes it has a reasonable basis for alleging a distinct injury caused by LIUNA's acquisition of "an interest or control" in the alleged RICO enterprise, it should file a motion for reconsideration.

"Local Union") – a local labor organization affiliated with LIUNA; and (9) Barrington Group – an organization hired to assist Local 332 in contract negotiations with PHA.

The Court draws the following brief recitation of facts from plaintiff's Amended Complaint (Document No. 20, filed May 12, 1997). It assumes the facts alleged in the Amended Complaint are true for purposes of the within Motion.

On January 26, 1996 plaintiff entered into a subcontract with defendant T.A.S.K.E.R./PREP to remove asbestos from housing units operated by PHA. After T.A.S.K.E.R./PREP was awarded the contract by PHA, plaintiff was contacted by T.A.S.K.E.R./PREP and the Local Union and directed to hire defendant Rudolph Nash. Thereafter, plaintiff "was forced" to hire various members of Nash's family. Plaintiff was also "required" to hire all employees through the Local Union. Plaintiff further accommodated defendant Nash at the direction of T.A.S.K.E.R./PREP and the Local Union, paying Nash extra money in cash, providing him with a bonus incentive and placing him in a position of authority over the project. Plaintiff complied with the terms of its subcontract and completed the asbestos removal covered by this first contract.

After the contract was completed, plaintiff was promised that it would be employed as subcontractor for asbestos removal under a second contract. T.A.S.K.E.R./PREP submitted a bid for the second contract to PHA in which plaintiff was listed as a minority contractor. Plaintiff had agreed, through discussions with T.A.S.K.E.R./PREP, to perform the asbestos removal under this second contract according to a specified fee schedule. While it was waiting for this second contract to be awarded, and at the direction of T.A.S.K.E.R./PREP and the Local Union, plaintiff retained defendant Nash on its payroll although Nash did no work. When the second contract was not awarded in the promised time-frame, plaintiff offered Nash work on other contracts, but he declined that work and was subsequently fired.

After being fired, Nash attended various meetings (while acting as an agent of other defendants, including LIUNA) and held himself out to be a representative of plaintiff. During this period, plaintiff also had disputes over money owed to Nash, and as a result of these disputes, money was withheld by T.A.S.K.E.R./PREP from plaintiff and paid directly to Nash. Also during this time, T.A.S.K.E.R./PREP filed an application with the City of Philadelphia for an "asbestos contractor license"; Nash was listed as the "General Supervisor" on this application.

At about the same time, PHA informed plaintiff that it had received a revised bid for the second contract in which plaintiff was allegedly still identified as a minority subcontractor for asbestos removal. Plaintiff never approved this revision and the new bid was for substantially less money than originally agreed to by plaintiff in discussions with T.A.S.K.E.R./PREP and the Local Union. Plaintiff alleges that the revised bid was submitted by Nash at the behest of the other defendants. During this period, various defendants communicated with PHA in an apparently unsuccessful effort to have plaintiff's name removed as a minority subcontractor from the contract; these defendants also informed PHA that T.A.S.K.E.R./PREP would be assuming a larger role in the performance of duties required by the second contract.

These communications took place without plaintiff's knowledge and the revision to the second bid was allegedly part of a scheme by which T.A.S.K.E.R./PREP, with Nash as General Supervisor, would assume the asbestos removal duties of plaintiff in performing the second contract. As part of the scheme to deprive plaintiff of its part in the second contract, deprive plaintiff of its ability to compete, divert plaintiff's profits and opportunities, and waste plaintiff's assets, plaintiff alleges that defendants acted through the mails and telephones.

There are seven counts in plaintiff's Amended Complaint – five of which are brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et. seq. – in which LIUNA is named a defendant: (1) violation of 18 U.S.C. § 1962(c) (Count I); (2) violation of 18 U.S.C. § 1962(c) (Count II); (3) violation of 18 U.S.C. § 1962(b) (Count III); (4) violation of 18 U.S.C. § 1962(b) (Count IV); (5) violation of 18 U.S.C. § 1962(d) (Count V); (6) state law claim of intentional interference with a contractual relationship (Count VI); and (7) state law claim of breach of contract (Count VII).

Defendant LIUNA seeks a dismissal, as against it, of those claims set forth in Counts I through V pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). Defendant LIUNA argues that plaintiff has failed to plead fraud with the specificity required by Rule 9(b). Defendant LIUNA also contends that even should the Court find that the pleadings meet the standards of 9(b), Counts I through V fail to state claims upon which relief may be granted. LIUNA advances multiple theories for this latter contention, arguing that plaintiff fails to allege: (1) the essential elements of a RICO claim; (2) the requisite "continuity"; (3) that LIUNA is a person "distinct" from the RICO enterprise; (4) that LIUNA participated in the "management and operation" of the enterprise"; and (5) that LIUNA "controls" the enterprise. Defendant's arguments are addressed in turn below.

2. Federal Rule of Civil Procedure 9(b). Defendant LIUNA contends that plaintiff has

failed to meet the requirements of Federal Rule of Civil Procedure 9(b). In an action predicated on fraud under RICO, a plaintiff must meet the pleading standards of Federal Rule of Civil Procedure 9(b). See PTI Services, Inc. v. Quotron Systems, Inc., Civ. A. No. 94-2068, 1995 WL 241411, *14 (April 19, 1995). Although Rule 9(b) imposes a heightened standard, in this circuit "the standard for 9(b) is [nonetheless] a generous one." Blue Line Coal Co. v. Equibank, 683 F.Supp. 493, 497 (E.D. Pa. 1988).

> Rule 9(b) does not require date, time, and place allegations, provided that the plaintiff gives the defendants other means of precision and substantiation. Seville Indus. Mach. V. Southmost Mach., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). So long as defendant has 'fair notice' of the charges against him, the purposes of Rule 9(b) have been satisfied.

United States v. Warning, Civ. A. No. 93-4541, 1994 WL 396432, *2 (E.D. Pa. 1994) (citing United States v. Kensington Hospital, 760 F.Supp. 1120, 1126 (E.D. Pa. 1991)). Moreover, "[p]articularly in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the detail of corporate internal affairs. Thus, courts have relaxed the [particularity] rule when factual information is peculiarly within the defendant's knowledge or control." Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1990) (citation omitted).

A review of plaintiff's Amended Complaint demonstrates that plaintiff has met these minimal standards. Plaintiff avers that the "national union . . . acted in concert [with others] to submit wrong bids on behalf of S & W in an effort to force S & W out of" a contract. Amended Complaint ¶ 37. The Amended Complaint also alleges that defendant Rudy Nash, on specific dates, acted as an agent of the "National Union" when he misrepresented to other entities his continued association with plaintiff in an effort to force plaintiff out of a contract. See, e.g., Amended Complaint ¶ 40. The Amended Complaint also alleges that plaintiff relied on the oral promises of the "National Union" that it would be awarded the contract. See Amended Complaint ¶ 61. While this cannot serve as a predicate act of fraud (because it was not made via the mails or by telephone), it does serve to connect LIUNA to the alleged RICO enterprise.

In reviewing the Amended Complaint as a whole, the Court concludes that it sufficiently puts defendant on " 'fair notice' of the charges against" it. Warning, 1994 WL 396432 at *2. It therefore satisfies the requirements of Rule 9(b) and the Court will not dismiss for failure to plead fraud with specificity.

3. Federal Rule of Civil Procedure 12(b)(6). Defendant LIUNA also seeks to have Counts I through V of the Amended Complaint dismissed, as against LIUNA, for failure to state a claim upon which relief may be granted. In examining a complaint under Federal Rule of Civil Procedure 12(b)(6), a court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citation omitted). A court may not dismiss on a Rule 12(b)(6) motion unless "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwest Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Racketeering Activity. Defendant LIUNA argues that plaintiff has failed to allege a "racketeering activity" which may serve as a predicate offense for a RICO claim under 28 U.S.C. § 1961 et. seq. Plaintiff, however, alleged in its Amended Complaint that defendants committed fraud via the mails, in violation of 18 U.S.C. § 1341, and by telephone, in violation of 18 U.S.C. § 1343. In its Amended Complaint, plaintiff outlines the alleged RICO scheme and avers that "[e]ach of the transactions enumerated above involved and involves the use of the United States mails or telephone calls in interstate commerce in the planning or execution thereof." Amended Complaint ¶ 67. It is true that plaintiff does not allege the exact date or content of many of these instances of alleged fraud. It contends, however, that information which will allow it be more specific is in the "sole possession and control of defendants." Amended Complaint ¶ 71.

An allegation of mail fraud has two components: "1) a scheme to defraud, and 2) use of the mails in furtherance of the scheme." City of Rome v. Galnton, 958 F.Supp.

1026, 1044 (E.D. Pa. 1997) (citation omitted). Plaintiff has set forth a scheme and alleged that defendants used the mails (and telephone) to further that scheme. Defendant LIUNA contends that the allegations of fraud lack the required specificity and that as the subject of the alleged fraudulent acts, plaintiff should be able to state the date, time and content of each alleged act. However, plaintiff responds that many of the acts of fraud plaintiff sets forth in its Amended Complaint were directed at other entities (either vendors of S & W or the Philadelphia Housing Authority ("PHA")) and thus plaintiff is unable to relate details of the alleged frauds at this stage of the proceedings.[2] The Court has already concluded that plaintiff satisfies the specificity requirements of Rule 9(b). For similar reasons, it will not dismiss Counts I through V of the Amended Complaint, as against LIUNA, at this stage of the proceedings on a Rule 12(b)(6) motion for failure to allege the necessary "racketeering activity."

Continuity. Defendant next contends that the Amended Complaint does not aver the requisite pattern of racketeering activity. Usually, when discussing RICO's "pattern" requirement, one is referring to the need that a plaintiff allege more than one predicate act. The "pattern" defendant discusses in his Brief in Support of his Motion, in contrast, is generally referred to as the "continuity" requirement: "'Continuity' is both a closed- and open-ended concept," H.J. Inc., 492 U.S. at 241, which may be proved by demonstrating a series of predicate acts over a "substantial" period of time. Id. at 242. A series of acts over a finite period of time is a closed-ended scheme. The Third Circuit has yet to find that conduct lasting less than twelve months satisfied the closed-ended "continuity" requirement. See Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995). Alternatively, "the threat of continuity may be established by showing that the predicate acts are part of an ongoing entity's regular way of doing business." Id. This is an open-

[2] The Court notes that PHA is also named as a defendant, and it is therefore difficult to understand how acts of fraud could be directed at PHA when it is also allegedly a participant in those fraudulent acts. Because the Court deals only with LIUNA's role in the alleged racketeering scheme, however, it will not address this question.

ended scheme.

In this case, plaintiff avers that the alleged racketeering scheme "occurred from August, 1994 to the present." Amended Complaint ¶ 72. It also alleges that the fraudulent activities "were and still are routine and an indispensable part in conducting the affairs of defendants in furtherance of the scheme." Id. at ¶ 71. It appears that plaintiff is alleging a closed-ended scheme – one directed only at plaintiff which will presumably come to an end when the immediate goals of the scheme are accomplished. While details of events before February 16, 1996 are lacking in the Amended Complaint, the Court will accept as true, for purposes of its decision on the Rule 12(b)(6) Motion, the allegation that the scheme began in 1994. It will not, therefore, dismiss the Amended Complaint at this stage of the proceedings for failure to allege the requisite "continuity."

Enterprise. Defendant next argues that plaintiff fails to plead a proper enterprise in this case because defendant LIUNA is not "separate and distinct" from the alleged enterprise as is required under 28 U.S.C. § 1962(c). This is often referred to as the "distinctiveness" requirement and for support, LIUNA cites Brittingham v. Mobil Corp., 943 F.2d 297, 300-03 (3d Cir. 1991). The Court rejects defendant's argument. Brittingham has been called into question by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995). See Hanrahan v. Britt, Civ. A. No. 94-4615, 1995 WL 422840, *7 (E.D. Pa. July 11, 1995). After Jaguar Cars, it appears that a defendant may be liable for a violation of 18 U.S.C. § 1962(c) so long as it is alleged to be one member of an association-in-fact engaged in a RICO enterprise. See Hanrahan, 1995 WL 422840, *7 (holding that plaintiffs satisfied the distinctiveness requirement where plaintiff alleged that the "person" was "Amway . . . and the enterprise is an association-in-fact comprised of defendant Amway and its network of Amway distributors"). In the instant case, plaintiff alleges that LIUNA is part of an association-in-fact (comprised of all of the defendants) which is engaged in the alleged RICO enterprise; the Court will not, therefore, grant the Rule 12(b)(6) Motion on this ground.

Nexus. Defendant argues that plaintiff has failed to allege that LIUNA participated in the "management or operation" of the alleged enterprise as required for liability under 18 U.S.C. § 1962(c). It is true that the Supreme Court has held that the language "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" in 18 U.S.C. § 1962(c) means that for a defendant to be held liable thereunder, he must have "participated in the operation or management of the enterprise itself." Reves v. Ernst and Young, 507 U.S. 170, 185 (1993). As the Court has already discussed, however, plaintiff has made allegations that LIUNA communicated allegedly fraudulent statements to plaintiff; at this stage of the proceedings, that is a sufficient allegation of LIUNA's participation in the operation of the enterprise. The Court further notes that plaintiff has plead that LIUNA has various connections to other defendants in this case. While these connections do not establish LIUNA's management of the enterprise, on a Rule 12(b)(6) motion the Court will draw all reasonable inference in favor of plaintiff. Applying that rule, it is not unreasonable to infer that the connections alleged establish LIUNA's participation in the "management" of the alleged enterprise. The Court will not, therefore, dismiss on this ground at this stage of the proceedings.

"Control" under § 1962(b). Defendant LIUNA's final argument is that plaintiff has to allege defendant's "control" of the enterprise in order to establish liability under 18 U.S.C. § 1962(b). It cites no law for this proposition and the Court will therefore start with the statute. The statute provides that it is unlawful "for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . ." 28 U.S.C. § 1962(b). By the express terms of the statute, it is sufficient to show a connection between a "person's" "interest in" an enterprise and the alleged racketeering activity. Cases do, however, discuss the requirement that under § 1962(b) there be "a specific nexus between control of a named enterprise and the alleged racketeering activity." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991).

The Court need not, however, determine whether it is necessary to allege "control" of an enterprise under § 1962(b) for it is clear that under that section, a plaintiff must at the very least demonstrate what is typically referred to as an "acquisition injury." That is, "[i]t is not enough for the plaintiff merely to show that a person engaged in racketeering has an otherwise legitimate interest in an enterprise." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190-91 (3d Cir.1993). Under § 1962(b) a plaintiff must also allege an injury arising from defendant's acquisition of any interest in or control of a RICO enterprise "independent from that caused by the pattern of racketeering" itself. Id.; see also Leonard v. Shearson Lehman/American Express, Inc., 687 F.Supp. 177, 181 (E.D. Pa. 1988) ("Such an injury may be shown, for example, where the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of his enterprise.").

In this case, the Court concludes that plaintiff has not alleged an injury caused by LIUNA's acquisition of "an interest or control" in the alleged RICO enterprise. All that plaintiff has alleged is an injury caused by the alleged pattern of racketeering activity; that is sufficient to state a claim under 28 U.S.C. § 1962(c). A distinct injury must be alleged under § 1962(b), however, and plaintiff has not done so. The Court will, therefore, grant defendant LIUNA's Motion to Dismiss Counts III and IV of the Amended Complaint against it on this ground. Because the complaint at issue has been amended once, the Court will not dismiss Counts III and IV without prejudice to plaintiff's right to file a second amended complaint. In the event plaintiff believes it has a reasonable basis for alleging a distinct injury caused by LIUNA's acquisition of "an interest or control" in the alleged RICO enterprise, it should file a motion for reconsideration.

BY THE COURT:

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JAN E. DUBOIS